



CUMBERLAND  
CITY COUNCIL

# Planning Agreements Policy

## AUTHORISATION & VERSION CONTROL

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## INTRODUCTION

Cumberland City Council is responsible for the planned development and delivery of adequate infrastructure and amenity to support population, housing and employment growth in the Cumberland local government area. Through the use of this Policy, Cumberland City Council intends to establish a fair, transparent, consistent and accountable framework for the negotiation, preparation and implementation of planning agreements.

## PURPOSE

This Policy sets out Cumberland City Council's policy relating to planning agreements under s7.4 of the *Environmental Planning and Assessment Act 1979*. The purpose of this Policy is to establish a framework to guide the use of planning agreements by Council.

## SCOPE

This Policy applies to all planning agreements proposed or entered into by Council and applies to all land in the local government area of Council (LGA), including any land owned by Council.

This Policy also applies to land outside of the Council LGA in the case of a joint planning agreement between Council and another council or planning authority for land outside of the Council LGA.

## DEFINITIONS

In this Policy, the following terminology is used:

**Act** means the *Environmental Planning and Assessment Act 1979*.

**Council** means Cumberland City Council.

**Developer** is a person who has sought to change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument s7.4(1)), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person.

**Development application** has the same meaning as in the Act.

**Development contribution** means the provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost, or the provision of a material public benefit to be used for or applied towards a public purpose.

**Development proposal** means a development application or a planning proposal.

**Net public benefit** means an overall gain to the public resulting from the consideration of the effects of both the development proposal and the development contributions under a planning agreement.

**Planning proposal** has the same meaning as in the Act.

**Planning proposal request** is a planning proposal requested or applied for by a developer.

**Public** includes a section of the public.

**Public benefit** is the benefit enjoyed by the public as a consequence of a development contribution.

**Public facilities** means public infrastructure, facilities, amenities and services.

Definitions of other terminology related to this Policy are contained within the *Cumberland Planning Agreements Guidelines*.

## **POLICY STATEMENT**

Council will apply this Policy to ensure the appropriate establishment of planning agreements which comply with s.7.4 of the *Environmental Planning and Assessment Act 1979* and provide infrastructure and other public benefits that support Council's strategic direction and provide good value to the community. Planning agreements should be prepared in accordance with this Policy and the *Cumberland Planning Agreement Guidelines*.

## **OBJECTIVES**

The objectives of this Policy, in conjunction with the *Cumberland Planning Agreements Guidelines*, are to:

- Establish a fair, transparent, consistent and accountable framework that governs the negotiation, preparation and implementation of planning agreements by Council.
- Facilitate flexible and innovative approaches to the delivery of infrastructure and services that is consistent with Council's corporate and strategic planning context.
- Broaden the range and extent of development contributions for public purposes arising from development.
- Enable development contributions under a planning agreement to fairly apportion the costs and benefits of development.
- Ensure that development delivers a planning outcome that contributes to a net public benefit for the wider community, consistent with relevant Council policies and priorities.

## **PRINCIPLES**

Council's use of Planning Agreements will be governed by the following principles:

- Planning decisions will not be bought or sold through planning agreements.
- Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other act or law.
- Council will not use planning agreements for any purpose other than a proper planning purpose.
- The consideration, negotiation and assessment of a planning agreement will, to the extent reasonably practicable and as required by law, be separated from the consideration of the planning merits of a development application or a planning proposal.
- Council will not use planning agreements as a means to overcome revenue raising or spending prohibitions to which it is subject or for other improper purposes.
- Development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms.
- Council will prefer benefits under a planning agreement to have some broad public benefit in relationship to particular development or the locality of the development, unless the benefit aligns to Council's corporate strategic documents, existing contribution plan, infrastructure identified in this Policy, or other infrastructure delivery documents adopted by Council.
- When considering a planning proposal or development application, Council will not give

undue weight to a planning agreement.

- Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement.
- Council will not improperly rely on its position in order to extract unreasonable public benefits from developers under planning agreements.
- Where Council has a commercial interest in development that is the subject of a planning agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development.
- The community is entitled to a share of the unearned increment of land value uplift as a consequence of the actions of Council as a planning authority.
- Council will generally not agree to a planning agreement which seeks any alleged surplus value being refunded to the developer. Council will also not agree to an offset against s7.11 contributions or s7.12 levies required to be made by the developer for other (future) development in the Council LGA.

## **REQUIREMENTS**

Council's policy position in relation to planning agreements is as follows:

### Context

Council's approach to the consideration of planning agreements will be based on this Policy and the Cumberland Planning Agreements Guidelines.

Council will consider entering into a planning agreement when a developer makes a planning proposal or a development application or a modified development application or a complying development application.

Under the Act, Council is required to take into consideration any draft planning agreement that a developer has offered to enter into or has been entered into, when determining a development application. Notwithstanding this, Council is not obliged to enter into a planning agreement with a developer.

### Strategic Approach to Planning Agreements

Council will require development contributions to provide a demonstrable net public benefit. The proposed benefit must provide a positive planning outcome for the people of Cumberland and be in accordance with the objects of the Act.

Council will prefer benefits under a planning agreement to have some broad public benefit in relationship to particular development or the locality of the development, unless the benefit aligns to Council's corporate strategic documents, existing contribution plan, infrastructure identified in this Policy, or other infrastructure delivery documents adopted by Council.

Development contributions achieved via planning agreements can be used to:

- deliver land, infrastructure and services identified in the Cumberland Local Infrastructure Contributions Plan and infrastructure delivery plans.
- land, infrastructure and services identified in this Policy.
- land, infrastructure or services not identified in the Cumberland Local Infrastructure Contributions Plan or infrastructure delivery plans but that are of a higher priority.

Acceptance of any land, infrastructure or services not identified in Council's existing local infrastructure contributions plan and/or other infrastructure delivery plans or in this Policy will be at the sole discretion of Council.

Where Council considers that value capture contributions are appropriate in respect of a particular offer to enter into a planning agreement, a rate of 50% of the uplift in land value will be considered by Council as a starting point for negotiations.

Council will ensure that planning agreements are open and transparent and take all reasonable steps to ensure that conflicts of interest are ameliorated.

### Administrative Framework

The planning agreement contribution negotiated under a planning agreement could comprise one or more of the following (to Council):

- a monetary contribution.
- dedication of land free of cost.
- partial or full delivery of new or enhanced infrastructure works / facilities free of cost, including any contribution towards ongoing maintenance of those works.
- dedication of affordable housing or the like free of cost.
- expansion, upgrades, augmentations, embellishments, fit outs and resourcing of existing infrastructure / public spaces / facilities.
- any other public benefit, as agreed to by Council.
- a combination of the above.

Where land is dedicated under a planning agreement, the value for the purposes of the planning agreement will generally be the market value of the land determined in accordance with Division 4 of Part 3 of the Land Acquisition (Just Terms Compensation) Act 1991. If development cannot take place on the land to be dedicated or any FSR entitlement is transferred from the land proposed to be dedicated to Council to the development component of the remaining parcel, a nominal value of one (1) dollar would be attributed to the land.

Dedication of land to Council negotiated under a planning agreement must be at no cost to Council. Council may, at its discretion, offset the value of land against monetary contributions for the same contribution type identified in Council's local infrastructure contributions plan or infrastructure schedule, but only land ascribed a value under this plan shall be entitled to an offset.

The value of land provided by the proponent will be verified by an independent registered valuer with at least ten (10) years' experience in valuing land in New South Wales.

In the case of works for a public purpose, Council will attribute a value to the works in accordance with a cost estimate prepared by an independent registered quantity surveyor.

The offset (or exclusion) of s7.11 contributions or s7.12 levies for development contributions offered under a planning agreement will be a matter for negotiation between Council and the developer based on the particular circumstances of the case. Council could negotiate to offer no offset, a partial offset or a full offset of s7.11 contributions or s7.12 levies.

When offsets are negotiated, to ensure sufficient s7.11/s7.12 funding is available for works identified in Council's Local Infrastructure Contributions Plan, Council will generally only accept an offset against contributions for land or works of the same contribution type identified in Council's contribution plan or infrastructure schedule.

Council will require a planning agreement to make provision for payment by the developer of Council's costs of and incidental to negotiating, preparing, advertising and entering into the agreement (including reasonable legal costs in obtaining advice in connection with the planning agreement, any necessary independent advice, valuations and reports) as well as administering and enforcing the agreement. Council may require the planning agreement to make provision for a contribution by the developer towards the ongoing administration of the agreement.

Council will require a planning agreement to contain a provision requiring the developer to register the agreement, at the developer's expense, pursuant to s7.6 of the Act. Council will require a planning agreement to acknowledge that Council has a caveatable interest in the land and may register a caveat against the title to the land prior to the planning agreement being registered. Once the agreement is registered, Council will withdraw any caveat it has.

Once the terms in the letter of offer are negotiated, a draft planning agreement and explanatory note can be prepared and lodged with Council, which should be consistent with the agreed terms. The letter of offer should be updated, if required to be consistent with the agreed terms and the draft planning agreement and explanatory note.

## **PROBITY STATEMENT**

As outlined in Council's *Statement of Business Ethics*, public probity is important to Council. Council will ensure that the consideration of any planning agreement is fair, transparent and is directed at achieving net public benefits in an appropriate manner, free of corruption or perception of bias. Council will ensure that planning agreements are used to provide good value to the community and the environment.

## **RELATED LEGISLATION**

The current legal and procedural framework for planning agreements is set by Division 7.1 of Part 7 of the Environmental Planning and Assessment Act 1979 and Division 1A of Part 4 of the Environmental Planning and Assessment Regulation 2000.

This Policy is also guided by the following:

- The Practice Note on Planning Agreements, Department of Infrastructure Planning and Natural Resources (July 2005)
- The Draft Practice Note Planning Agreements and the Ministerial Direction for Planning Agreements – Draft for Consultation published by the Department of Planning, Industry and Environment (April 2020)
- The Development Assessment Internal Audit Tool, Independent Commission against Corruption (2010)
  - The Submission to the Draft Voluntary Planning Agreement Policy, IPART (December 2016)
  - Direct Negotiations – Guidelines for Managing Risks in Direct Negotiations, Independent Commission Against Corruption (May 2006)
- Economic Advice on Value Sharing for Planning Agreements, SGS Economics and Planning (August 2017)

Whilst Council is not legally bound to follow the Practice Note, it will be guided by the Practice Note. If there is any inconsistency between the Practice Note and this Policy, Council will be guided by this Policy. The Department of Planning and Environment issued a Draft Practice Note on Planning Agreements in April 2020 for comment. This Policy may be amended, if required, for consistency with any revised Practice Note.

This Policy is not legally binding. It is intended to provide a guide for Council officers and all persons dealing with Council concerning planning agreements. Council considers that the process involved in negotiating and finalising planning agreements will be more efficient and effective if this policy is followed to the fullest extent possible but recognises that each offer to enter into a planning agreement must be assessed on its merits having regard to the particular circumstances.

## **RELATED DOCUMENTS AND COUNCIL POLICY**

This Policy should be read in conjunction with:

- Cumberland Planning Agreements Guidelines